Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

NO. 74 - 754

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

V.

ROY MANDUJANO

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR

THE FIFTH CIRCUIT

MEMORANDUM FOR ROY MANDUJANO IN OPPOSITION

Michael Allen Peters
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1217 Calhoun
Houston, Texas 77002

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

V.

ROY MANDUJANO

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The Respondent asks leave to file this response to the United States Petition for a Writ of Certiorari pursuant to Rule 53, in Format Pauperis.

The Attorney for Respondent was Court appointed by the Fifth Circuit of Appeals under the Criminal Justice Act and was directed by the Supreme Court to file a response to the United States of America's Petition for Certiorari.

Respectfully submitted,

Michael Allen Peters

Michael Allen Peters
1217 Calhoun
Houston, Texas 77002
713/237-1001

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Petitioner contends that the self-incrimination provision of the Fifth Amendment does not require the giving of Miranda warnings to a person in the status of a putative defendant or an ordinary witness in the grand jury context; and that in the event there are Miranda warnings required but yet were not given, then does this permit a person to commit perjury with impunity when testifying before the grand jury as a putative defendant?

I

A statement as to important dates need be summarized for the Court to consider the questions presented:

(1) March 29, 1973: This is the date on which Roy Mandujano allegedly made an attempted distribution of one ounce of heroin to Dale Agents.

(2) May 2, 1973: The date on which Mandujano was compelled to appear before the grand jury after receiving his subpoena only a week before.

(3) June 4, 1973: The Dale Agents involved made and prepared their report on the incident on March 29, 1973.

(4) June 13, 1973: Roy Mandujano was indicted by the Grand Jury.

When Roy Mandujano was before the Grand Jury on May 2, 1973, the "focus of the investigation" was upon him. The investigation commenced in March 1973 and Mandujano's appearance before the Grand Jury was a continuation of that investigation. The Grand Jury was not merely making a general investigation; rather, there were specific acts upon which the Grand Jury made the focal point of their investigation. The very same specific acts which were the basis of the indictment by the Grand Jury were the same as that incident on March 29, 1973, which the Government agents already had sufficient information to present to the Grand Jury, without Mandujano's appearance being necessary. Thus, there was enough information to indict Mandujano.

The Special Prosecutor before the Grand Jury had already talked with the agents who conducted the investigation. This Special Prosecutor asked specific questions which questions were exactly specific of the incident of March 29, 1973, and indeed focused, not in the realm of general inquiry, but on specific acts which already occurred and had already been investigated by the Government agents.

The Fifth Circuit in United States v. Morado, 454 F. 2d 167 (1972) held that "if the investigation passes beyond the stage of being a general inquiry into an unsolved crime and focused upon a person as a defendant, whom the Government planned to indict and against whom it was gathering incriminating evidence, then the Court would fact the necessity of embracing or rejecting the Rule" (of the virtual or putative Defendant). The Fifth Circuit in United States v. Roy Mandujano, 496 F 2d 1050 (1974) held that Mandujano was a putative Defendant as the focus of the investigation was upon him.

When Mandujano appeared before the Grand Jury the Special Prosecutor knew what was involved and for him to state that he (Special Prosecutor) had no intention of indicting Mandujano for a violation of 21 USC 846 (a) (1) is beyond belief. Subpoening Mandujano to appear before the Grand Jury was just another step by the Government in gathering specific data to use against Mandujano as is evident from the subsequent indictment.

It is not necessary that an accused be under formal arrest prior to the interrogation for Miranda rights to arise. Windsor v. United States, 389 F. 2d 530 (5th Cir., 1968). In Windsor, it was held that Miranda rights had arisen and the Court said, "The Governments Agents' testimony that Windsor was not a suspect and not under arrest when questioned in his motel room is belied by the facts of the case. ...Windsor was definitely the central figure in their investigation..." In Miranda, itself, the Supreme Court explained that "in custody" was a short-hand phrase for what Escobedo v. Illinois, 378 U.S. 478, 490, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), described as an investigation which has focused on an accused. In United States v. Phillips, 443 F. 2d 246 (5th Cir., 1971), the Court in dictum stated that merely because the questioning takes place in familiar surroundings rather than at a police station does not mean that a person is not being subjected to custodial interrogation; nor does a person have to be under formal arrest prior to interrogation for Miranda to arise.

A Grand Jury room could be considered like a police station. In Mattox v. Carson, 424 F.2d 202 (5th Cir., 1970),

the Court held that a Grand Jury investigation was indeed custodial interrogation as was contemplated by Miranda. Consider that Mandujano was compelled to appear in response to a subpoena. Mandujano was further compelled to take the witness stand and had to

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answer the questions asked. This Grand Jury subpoena and Mandujano's appearance before the Grand Jury was to place him in a "compelling" atmosphere in which he was deprived of his freedom and rights and thereby placed him in a custodial atmosphere.

Miranda applies when an individual is in custody or deprived of his freedom in any significant way and is subjected to questioning which jeopardizes the Fifth Amendment right against compulsory self-incrimination. After the Miranda warnings are given and after the person has had an opportunity to exercise those rights, then and only then can an individual knowingly and intelligently waive these rights. When a person who is not under investigation is compelled to appear before the Government's agent, the Grand Jury, then there is no requirement to administer Miranda warnings and thus there is no impairment of the Grand Jury's effectiveness. Furthermore, not every Grand Jury witness realizes that the Government has incriminating evidence at the time he is called to testify in a putative Defendant nor are Miranda warnings required. The turning point is when the Grand Jury focuses, as they did in Mandujano, upon specific acts, at which time the Grand Jury should and indeed must advise the witness of his Miranda warnings and then the Grand Jury must afford the individual the opportunity to exercise those rights so that an individual can knowingly and intelligently waive those rights.

Mandujano, with his 10th grade education, obviously did not knowingly and intelligently waive his rights let alone understand them as is illustrated by the following questions asked by the Grand Jury Prosecutor:

> "You are required to answer all the questions that I ask you except for the ones that would tend to incriminate you" -- to which Mandujano replied -- "Do I answer all the questions you ask?" (G. TR. 3-4)

The same Special Prosecutor asked Manjujano in the same Grand Jury setting that, "I take that to mean you do not wish the services of a lawyer here today?" --To which Mandujano replied that he had

talked to an attorney and that he could not afford one.(App. A, p. 3A) This response caused the Special Prosecutor to state to Mandujano that the lawyer could not be inside the Grand Jury room but only outside.

Thus, the Special Prosecutor implied to Mandujano that it would do him no good to have an attorney with him anyway. Furthermore, it is very apparent that Mandujano did not understand the questions as to self-incrimination clearly, otherwise, why did Mandujano respond, "Do I answer all the questions you ask?"

Then the Special Prosecutor stated to Mandujano: "You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And of course, if you do not answer those truthfully, in other words, if you lie about certain questions, you could possibly be charged with perjury. Do you understand that?" To which Mandujano replied, "Yes, sir." (G. Tr. 3-4) In light of Mandujano's already apparent lack of understanding from the previous question regarding incrimination, the question posed by the Special Prosecutor was not only long, but was couched in terms of ambiguity, so much so that the Special Prosecutor himself in the midst of his question, had to rephrase what he thought as is exemplified by the interjection of "in other words".

Further, the word "possibly" created ambiguity and confusion to Mandujano because of the way in which it was used. The Special Prosecutor stated, "... You could 'possibly' be charged with perjury...", which gives an ambiguous meaning that a wrong answer or a false utterance is not perjurious but might be. Because the "warning"given was confusing, not understood, and ambiguous, plus the possible threat that was involved to Mandujaro, there is raised the question as to whether Mandujano may have been compelled in some significant way to testify by the form of the warning or deterred by it from invoking his privilege.

Further, the Government continually presents the question phrased in many guises but limited to a question not raised by the Fifth Circuits holding. The question asked by the Government is whether a Grand Jury witness suspected of participating in the substantive offense must, prior to testifying, be advised of his Fifth Amendment privilege against self-incrimination. The proper question should be: whether a "putative" Defendant (someone not just suspected) who is compelled to appear before a Grand Jury must be advised of his Fifth Amendment right as well as to be advised of his Miranda warnings?

Mandujano was not merely suspected of participating in a substantive offense, he was already allegedly known to have done so as the Governments' Dale agents had informed the Special Prosecutor. The Prosecutor states that "he did not consider the transaction to have been an indictable offense" (Tr. 19). The Prosecutor stated that he did not intend to seek an indictment against Mandujanc at that time (Tr. 15-16). The only intent on the part of the Prosecutor was to ask the specific details surrounding the incident on March 29, 1973.

The Government contends that there are additional related issues as to whether the "putative" Defendant concept is to be deferred by reference to subjective criteria reflecting the prosecutor intent of Government attorneys or objective criteria that consider whether the Government possesses incriminating evidence against the witness at the time he is called to testify. Miranda answers the Government's inquiry as to whether subjective criteria or objective criteria determines the status of a witness to be either an ordinary Grand Jury witness or that of a putative Defendant. The test is whether the investigation was specific, focused on a specific violation of the law, and focused specifically upon the individual as the violator, an individual who is the focus of the investigation thereby removes himself from the role of an ordinary Grand Jury witness to that of the putative Defendant, which requires special warnings to be given before further questioning. What is to prevent the Grand Jury from subpoenaing and compelling everyone who was ultimately to be indicted to appear

and testify about those specific matters about which he is ultimately indicted. Consider also the hypothetical regarding the case of a defendant, already indicted, who is compelled by subpoena to appear before a Grand Jury. Is this individual entitled to any type of Miranda warnings? Fifth Amendment Advisement?

As to the crucial point dealing with committing perjury with impunity, as would seem to be the end result of affirming the District Court and Court of Appeals, there comes the question as to whether an agent of the prosecution, be it the Grand Jury or police, can compel a putative Defendant to appear and testify against his Fifth Amendment right. Where a totally unfair procedure is used, such as that which occurred when Mandujano was compelled to appear before the Government's tool, the Grand Jury, elemental fairness requires that the "putative" Defendant be advised of his Miranda warnings and that failure to do so will result in supressing the Grand Jury testimony. Consider the same result if the police fail to advise an accused before a confession is obtained. The test as stated by the Fifth Circuit was based on Potts v. Brady, 316 U.S. 455, 462, 62 S. Ct. 1252, 1256, 86 L. Ed. 1595 (1942) which stated that: "Asserted denial of due process is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such a denial."

CONCLUSION

For the forestated reasons it is respectfully submitted that the Government's Petition for a Writ of Certiorari should be denied.

Michael Allen Peters

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STATE OF TEXAS X
X AFFIDAVIT OF SERVICE
COUNTY OF HARRIS X

1. My name is Michael Allen Peters.
2. I am licensed to practice law in the State of Texas.
3. I am not licensed to practice before the Supreme Court of the United States.
4. I represent the Respondent, Roy Mandujano, in the Fifth Circuit Court of Appeals on the questions presented for Certiorari.
5. I certify that a true copy was mailed certified, return receipt requested, postage prepaid, to the Solicitor General of the United States, Robert Bork, Department of Justice, Washington, D.C. 20530, on this the 20th day of February, 1975.

Michael Allen Peters
Michael Allen Peters

Sworn to and subscribed to before me the undersigned authority by Michael Allen Peters on this the 20th day of February, 1975, in Houston, Harris County, Texas.

Mark S. Robinson
Notary Public

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MARK S. ROBINSON
Notary Public in and for Harris County, Texas
My Commission Expires June 1, 1975